within the meaning of section 19 and therefore was not liable to pay compensation.

It cannot therefore be said that the effect of the order of the arbitrator is that the arbitrator had thereby decided that the defendant in this civil suit was not the deceased's employer.

Since the present action against the defendant who deceased claimed was his employer, the fact that the arbitrator's award still stands, should not, because of its uncertain nature, estop the plaintiff, deceased's widow from making such an assertion. I would therefore, with respect disagree with Mr. Atma Singh Gill's contention that she should be debarred from maintaining this suit under section 41(1)(a) of the Ordinance.

Despite the urgings of learned counsel for the applicant in his written submission, I think it premature to make any ruling on plaintiff's alternative prayer contained in paragraph 11 of her statement of claim, or comment on what the trial court should do, should the contingency under section 42(2) of this Ordinance arise.

The application is dismissed with costs.

Application dismissed.

Solicitors: *Atma Singh Gill & Gill; Shearn, Delamore & Co.*

CH'NG YAT HUAT v. LEE CHU PEE & ANOR.

[O.C.J. (Syed Othman J.) August 17, 1974]
[Johore Bahru — Summons in Chambers Entered No. 267 of 1974 (Civil Suit No. 325 of 1972)]

Practice and Procedure — Judgment debt — Order for payment by instalments — Default — Whether judgment creditor entitled to issue writ of seizure and sale — R.S.C., 1957, O. 47, r. 17(a).

The plaintiffs had obtained a consent judgment against the defendants and it was ordered that the judgment debt should be paid by instalments and that in the event of default of payment of any instalment the whole of the balance unpaid shall become due and payable. The defendants did not pay the instalments due and the plaintiff caused a writ of seizure and sale to be issued. The first defendant sought to have the seizure set aside on the ground that it was wrongful or irregular.

Held: the failure by the defendants to pay any instalment by the date ordered makes the whole balance due and payable and the effect is that the order to pay by instalments is vacated and the judgment creditor is entitled to issue forthwith a writ of seizure and sale, unless the whole balance is paid.

Cases referred to:-

(1) *G. Stephen* v. *Vallipuram* [1934] M.L.J. 298.

(2) *Ahna Moona Muthuraman Chettiar* v. *K.M. Nair & Ors.* [1938] M.L.J. 177.

(3) *Woodham Smith* v. *Edwards* [1908] 2 K.B. 899.

APPLICATION.

Ng Kong Yeam for the plaintiff/respondent.

L. M. Ong for the first defendant/applicant.

Syed Othman J.: There was a settlement between the parties in an action relating to the application now before me. For the purpose of the present application the relevant portion of the judgment reads as follows:

"... By consent this court doth order that judgment be and is hereby entered for the plaintiff against the defendants in this action in the sum of Dollars Twenty-five Thousand ($25,000) only and by consent this court doth further order that the defendants do pay to the plaintiff the said sum of $25,000 only by fifteen (15) equal monthly instalments, the first of such instalments to be paid on or before the 1st day of April, 1974 and the subsequent instalments thereof on or before the 1st day of each succeeding month until the whole of the aforesaid sum shall have been fully settled and in the event of the defendants failing to pay any one monthly instalment in the manner as hereinbefore ordered, the whole of the balance then remaining unpaid shall immediately become due and payable."

On the 1st April, 1974, the defendants did not pay the first instalment. By a letter dated 28th April, 1974 the solicitors for the plaintiff, demanded defendants to pay the instalment and stated that unless the sum was paid the whole of the judgment sum of $25,000 would become payable. On 22nd June, 1974 the defendants paid $1666.66. By a letter dated 19th May, 1974 the plaintiff's solicitors demanded payment of $3,333.32 being instalments for May and June, 1974. According to the first defendant she could not pay because she could not get the second defendant to give her any money. As no payment was made, on 11th June, 1974 the plaintiff caused a writ of seizure and sale to be issued and all movable properties at defendants' place of business and those in first defendant's house were seized.

The first defendant in her application says that that the seizure was wrongful or irregular and seeks to set it aside. In argument Mr. Ong, for the first defendant, says in effect that the seizure and sale is bad as the order of the court for payment by instalments should operate as a bar to other forms of execution. He relies on order 47 rule 17(a) of the Rules of the Supreme Court and two cases cited below. The relevant portion of order 47 rule 17(a) reads:

"Every person to whom any sum of money ... are payable under a judgment ... shall, as soon as the money are ... payable, be entitled to sue out one or more writ or writs of seizure and sale to enforce payment thereof, subject nevertheless as follows:

(a) if the judgment or order is for payment within a period therein mentioned, no such writ as aforesaid shall be issued until after the expiration of such period."

In *G. Stephen* v. *Vallipuram*[1] Howes J. said:

"So long as the order for payment by instalments exists, I hold that the judgment-creditor cannot proceed to execution. There was no provision in the judge's order as to what was to be done in the event of the judgment-debtor making default. The remedy was therefore in default, for the judgment-creditor to apply to have the order as to payment by instalments rescinded. This he did not do until after the order to attachment had been issued."

In *Ahna Moona Muthuraman Chettiar* v. *K. M. Nair and Others*,[2] a Singapore case, the head-notes read:

"An order made under section 665 of the Civil Procedure Code, 1907 corresponding to R.S.C. O. 40 r. 30(3) for payment of the judgment debt by monthly instalments operates as a bar to any other process of execution in respect of the unpaid balance of the judgment debt, and while such an order is in operation and the payments thereunder are being made, a judgment creditor is not entitled to issue a writ of seizure and sale."

Although this is a Singapore case, under the old Straits Settlements Civil Procedure Code, the principle can be said to be the same here as was in Singapore.

I would observe that the two cases apply to an order for payment by instalments only without any provision for default. It seems to me that under the existing provisions of law where the court makes such an order, if there is a default in payment the judgment creditor may issue a notice calling upon the judgment-debtor to attend before the court and show cause why he should not be committed to prison for the default (see section 4(7) of the Debtors Ordinance, 1957); or he may sue out for a writ of seizure and sale for those instalments in arrears. Order 47 Rule 17(a) on its proper construction clearly allows this. *Woodham Smith* v. *Edwards*,[3] referred to by Horne J. in *Ahna Moona's* case, *supra*, appears to establish the principle that where an order has been made for payment of a judgment debt by instalments, execution may issue for the amount of instalments which have become due and are unpaid.

In the present application I need only concern myself with what is intended by the order of court when the judgment by consent was entered. The parties agreed that the judgment debt was to be paid by 15 monthly instalments, each instalment by the first of every month, commencing on 1st April, 1974, and "in the event of the defendants failing to pay any one monthly instalment in the manner .... ordered, the whole of the balance then remaining unpaid shall immediately become due and payable". From the very wording, the intention is very clear and it is this: the failure by the defendants to pay any instalment by the date ordered makes the whole balance payable. In effect this means the order to pay by instalments is vacated and the judgment-creditor, i.e. the plaintiff, is entitled to issue forthwith a writ of seizure and sale, unless, of course, the whole balance is paid.

The application is dismissed with costs.

Application dismissed.

Solicitors: *L. M. Ong & Co.; Ng Kong Yeam.*

AMANULLAH BIN HAJI ALI HASAN v. HAJJAH JAMILAH BINTI SHEIK MADAR

[O.C.J. (Syed Othman J.) August 27, 1974]
[Johore Bahru — Probate No. 1 of 1973]

Muslim Law — Will — Validity of — Will made when testator was in a coma during illness — Disposal of more than one-third of deceased's property — Legacy to heir — Wills Ordinance, 1959.

The plaintiff claimed as sole executor and trustee named in the will dated February 24, 1968 of his father, Haji Ali Hasan bin Zulfran, who died on February 27, 1968 to have the will established; or alternatively he claimed to be entitled to one-third share of all property of the deceased named in the will under Muslim Law. Under that will the plaintiff was given the whole of the estate of the deceased. The defendant contended that the will was invalid as it was executed when the deceased was not of sound mind, memory and understanding and that the plaintiff was only entitled to his share in accordance with the Muslim Law of inheritance. She also counterclaimed for probate of the will of the deceased dated May 7, 1961, which named the plaintiff and the defendant as executors and trustees and directed them to distribute the estate according to Muslim Law.

Held: (1) on the evidence the 1968 will was made by the deceased when he was in a coma during an illness and therefore it was not validly made;

(2) even if it was validly made it would be void because it purported to dispose of more than one-third of the estate and because it purported to benefit one of the testators' heirs;

(3) there was no dispute that the testator made the 1961 will and as it did not contravene the Muslim law, it should be admitted to probate.

Cases referred to:-

(1) *Shaik Abdul Latif* v. *Shaik Elias Bux* (1915) 1 F.M.S.L.R. 204.

(2) *Siti* v. *Mohamad Nor* (1928) 6 F.M.S.L.R. 135.

PROBATE SUIT.

C. H. Lim (*Hooi Sook Heng* with him) for the plaintiff.

Abdullah bin Abdul Rahman (*Lee Lin Jin* with him) for the defendant.

Syed Othman J.: The plaintiff claims as sole executor and trustee named in the will dated 24th February, 1968 (1968 will) of his father Haji Ali Hasan bin Zulfran (deceased), who died on 27th February, 1968 to have the will established; alternatively he claims he is entitled to one third share of all property named in the will under Muslim Law.

The defendant contends that the will is invalid on the ground that when it was executed the deceased was not of sound mind, memory and understanding and that the plaintiff is only entitled to his share in accordance with the Muslim Law of distribution. She counterclaims pronouncement against the 1968 will and for the will of the deceased dated 7th May, 1961 (1961 will).

The plaintiff in reply says that at the time of execution of the 1961 will the deceased did not know and approve of its contents, and alternatively the 1961 will had been revoked by the 1968 will.

The case for the plaintiff is briefly as follows. On 24th February, 1968 the deceased was ill in the General Hospital, Johore Bahru. Close relatives and the defendant were in the room where the deceased was warded. The deceased was weak. He asked the plaintiff to get a lawyer. He went out and fetched Encik Sim Teow Geok who lived near his house. The two came back to hospital. The deceased gave instructions to prepare a will. They went back to Encik Sim's house. Encik Sim prepared a will. Then the plaintiff got Encik Wan Hashim, a family friend, to come along and be a witness. They all went to the hospital. It was 9.00 p.m. All members of the family were in the deceased's room. Encik Sim spoke to the deceased and read out the draft will to him in English. He did not say much. Since the deceased's hand was paralysed Encik Sim with the assistance of Abdul Rashid, a brother of the plaintiff, (DW4), got the deceased to put his right thumb impression on the will. Encik Wan Hashim read to the gathering his translation of the will. Then both Encik Sim and Encik Wan Hashim signed as witnesses.

The defence story is briefly as follows. The deceased was first admitted into the hospital on 13th February, 1968. According to Datuk Dr. Lim Kee Jin, who supervised treatment and who knew the family, the deceased suffered from a stroke on the right side; he was also a chronic diabetic; he was